THE CONSTITUTIONALITY OF OLD AGE PENSIONS.

FRANK J. GOODNOW.
Columbia University.

The question of the constitutionality of government aid to the needy classes in the community may arise because of the existence of the rule which forbids the exercise of the power of taxation for any but a public purpose.

The general principle that the purposes for which this power may be exercised must be public is perfectly clear, but the principle is to be applied in the light of our history. Thus from a very early time in the history of both England and this country the taxing power had been used to provide funds for the support of the poor. The poor laws, as they were called, have been regarded as constitutional notwithstanding the general rule of constitutional law to which allusion has been made.

As new conditions have appeared to make necessary attempts on the part of the legislature to accord aid to various classes of individuals in the community, the courts have been called upon to determine whether such attempts are forbidden by the principle requiring that the purpose of the legislature shall have been public or whether they fairly come under the exception to the rule which has been shown always to have existed.

The validity of such attempts is to be determined in the first place by a consideration of the purpose and effect of the 14th amendment. There was nothing in the original constitution of the United States or in the original amendments thereto which could be regarded as limiting to public purposes the taxing power of the States. In Loan Association *v.* Topeka (20 Wall. 655) it is true the Supreme Court of the United States held invalid certain bonds issued by a municipal corporation

in aid of a private manufacturing enterprise. The grounds for the decision were that there are, as Mr. Justice Miller expressed it, certain "rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all a despotism. . . . To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery because it is done under the forms of law and called taxation. . . . We have established, we think beyond cavil that there can be no lawful tax which is not levied for a public purpose." This was said as to the meaning to be given to the constitution of the state of Kansas which the court was called upon to apply in the absence of decisions by the state courts interpreting it.[1]

Mr. Justice Clifford dissented from the conclusions of the court on the ground that "Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people and convert the government into a judicial despotism."

The views of Mr. Justice Clifford are approved in Fallbrook Irrigation District *v.* Bradley (164 U. S. 112) where it is said that, if an act of a state legislature does not violate some provision of the federal constitution, "there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law." The court after making this

[1] See Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112–155.

statement proceeds to decide the case before it on the theory that state taxation for a private purpose would be forbidden by the 14th amendment.

It may therefore be said that the employment by the state of the power of taxation for a private purpose is unconstitutional from the point of view of the United States constitution.

What now is the distinction made by the United States Supreme Court between a public purpose, taxation for which is proper, and a private purpose, taxation for which is improper? In its decision of this question the Supreme Court has never overruled the decision of a state court that a given purpose, for which state taxes had been levied, was public in character. In Olcott *v.* Supervisors, 16 Wall 689, the Supreme Court did indeed claim that it was not bound by the decisions of the state courts as to what is a public purpose for which taxes may be levied and was of the opinion that a purpose was public which had been declared to be private by the state court. The case would appear, however, to have been decided on other grounds. Indeed, in Fallbrook Irrigation District *v.* Bradley (164 U. S. 112), the court, while denying that the determinations of state courts are conclusive "upon the question as to what is due process of law, and as incident thereto, what is a public purpose," observes; "it is obvious, however, that what is a public use frequently and largely depends upon the the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." In this case the court held, for example, that irrigation was a public use in arid districts and says: "The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances than can anyone who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts

of California, we yet, in the consideration of the subject, accord to and treat them with very great respect and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that State on this question."

While the California case recognized differences due to climate and geographical conditions, a later case from Massachusetts (Welch *v.* Swazey, 214 U. S. 91) recognized that the same influence was to be accorded to social conditions. In this case, the Supreme Court took almost the same position with regard to a law passed to remedy, through limitations imposed upon the height of buildings, the evils resulting in urban conditions such as exist in a great city like Boston, from the uncontrolled use of land.

Whether the court will carry this idea of the local autonomy of the states in deciding what should be the remedies to be applied to the evils attendant upon an intense industrial life under conditions of freedom of individual action, of course cannot be said, but the logic of the argument cannot be avoided if the court can be brought to see that the difference in conditions due to the varied occupations of the people in different parts of the country are in reality just as great as the differences in climate and social conditions which were recognized in the opinions from which quotations have been given.[2]

It may therefore be concluded both from these opinions and from the absence of decisions overruling the determinations of state courts on the subject that each of the states has quite a large freedom of action in determining, in the circumstances and conditions existing within it, what purposes are public from the view point of its power of taxation.

We are thus brought to a consideration in the second place, of the decisions of the state courts as to what are public purposes for which the power of taxation may be exercised.

The state courts have been influenced in their determination of this question by the fact that the undertaking which was

[2]See also Missouri *v.* Lewis, 101 U. S. 22, for a recognition of the principle that varying conditions of population may under the 14th amendment be subjected to different treatment by the states.

being aided by the exercise of the power of taxation was or was not in the control and management of private corporations or individuals. Where the control and management are private they are more apt to regard the purpose as private than where such control is in the hands of the state or local authorities. Thus, the Supreme Court of Ohio has held that even under a constitution recognizing a duty upon the part of the state to support the indigent blind in public institutions, it is improper for the legislature to grant out of public funds an allowance to an indigent blind person not supported in a public institution.[3]

When it is said that the courts are influenced by the fact that the undertaking is under private control it is not meant to indicate that the character of the control is decisive. For the courts have frequently held that where the character of the purpose is unquestionably public, the character of the control is immaterial. Thus the use of the taxing power to aid railway corporations has almost universally been upheld as constitutional.[4] It is usually where the character of the purpose is doubtful that the character of the control affects the decision.

In what, now, does doubt as to the character of the purpose consist? In answering this question we have, as has been intimated, to resort to history which has such a potent influence on the decision of constitutional cases. Nowhere perhaps is the historical argument more forcibly expressed than in Loan Association *v.* Topeka, (20 Wall. 655) where the court says: "In deciding whether, in the given case, the object for which the taxes are assessed falls upon one side or the other of this line, they [the courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation

[3] Lucas Co. *v.* State, 75 Ohio St. 114; see also Wisconsin Keely Inst. Co. *v.* Milwaukee Co., 95 Wis. 153, where a payment to a private corporation for the cure of an indigent drunkard was declared to be improper. But see Mayor *v.* Keely Inst., 81 Md. 106; In re House, 46 Pac. (Col.) 117; and White *v.* Inebriates Home, 141 N. Y. 123.

[4] See for example Olcott *v.* Supervisors, 16 Wall, 689.

levied, what objects or purposes have been considered necessary to the support and for the proper use of the government whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

It follows therefore that the objects for which taxes have been levied in the past are public purposes from this point of view. Thus roads, schools, highways, and the protection of the peace, of the public health and safety are all public purposes for which taxes may be levied.

It is only when we come to the new functions the discharge of which changed economic and social conditions make it seem necessary for the state in either its central or local organizations to assume, that we meet with difficulty. What criterion are we to adopt when we come to consider such subjects as old age, accident and sickness pensions, which in some form appear to be essential parts of the program of social reform in Germany, England and Australasia?

As no attempt has as yet been made in this country to establish old age, sickness and accident pensions, we have no decision directly in point. We have, it is true, a few decisions on the subject of pensions to government employees. But they cannot be regarded when favorable as having any particular force since such pensions are regarded rather as a part of the compensation attached to government employment than as gratuities.[5] Indeed, we have a few decisions which hold such pensions to be improper where they are awarded to persons who have already been retired from the public service,[6] or who, while in the public service, have not been induced to continue in the service as a result of their award.[7] On the other hand, the cases holding service pensions of this character to be unconstitutional cannot be regarded as deciding

[5] See *e. g.* Commonwealth *v.* Walton, 182 Pa. St. 373.
[6] See *e. g.* In the Matter of Mahon, 171 N. Y. 263.
[7] See State *v.* Ziegenhein, 144 Mo. 283.

that old age pensions *e. g.* are improper where such pensions are confined to the indigent since no attempt has been made in providing for service pensions to confine them to those who are in pecuniary need.

In endeavoring to answer the question as to the constitutionality of old age, accident and sickness pensions, we must study the cases which have been decided as to doubtful purposes of taxation,—*i. e.*, doubtful from the point of view of their being public or private,—and then try to reason by analogy from them to the question in hand. A study of the cases which have held purposes to be private and therefore to be improper purposes of taxation can hardly fail to force the conclusion that any purpose is an improper purpose for taxation which consists in the grant of public monies to individuals who are not in the service of the government or who cannot be regarded because of their poverty as fit subjects of public charity. An old age, accident or sickness pension which is not conditioned upon poverty would probably be regarded by the courts as unconstitutional where the funds from which it was paid were derived from taxation.

Nor would the benefits to the general social welfare which might conceivably be derived from such a pension have very great effect upon the attitude of the courts. Even if these advantages were conceded the pensions would still be declared unconstitutional unless former decisions were overruled. For very generally, advantages derived by the public from the expenditure of public money do not make public the purpose of the taxes from which such money is obtained. This was decided by Lowell *vs.* Boston. (111 Mass. 454). This case declared unconstitutional an act of the legislature providing for the issue of bonds the proceeds of which were to be loaned to individuals to aid them in rebuilding in the district destroyed by the great Boston Fire.[8] There is also a series of cases, of

[8] See also State *v.* Osawkee Township, 14 Kan. 418, which declared the grant of aid to poor farmers to purchase grain for seed and feed, in districts affected by drouth was not a public purpose. This case was decided in 1875, only two years after Lowell *v.* Boston. Cf. William Deering Co. *v.* Peterson, 75 Minn. 118.

which Loan Association *v.* Topeka is an example, holding that the issue of city or state bonds payable out of the proceeds of taxation to aid private manufacturing corporations is improper as imposing taxation for a private purpose.

Lowell *v.* Boston and Loan Association *v.* Topeka were decided many years ago (1873 and 1874, respectively). While there has been no indication of an attempt to reverse them as to the particular points of the law which they decided, they have not, however, been extended in their operation. There are also a number of cases, some decided by the Supreme Court of the United States, which have extended the principle of the railway aid cases so as to include mills for grinding grain which are open to all comers at a fixed toll,[9] as well as one case in a state court which has somewhat extended the conception of public charity so as in districts affected by droughts and other calamities to permit the use of the taxing power to obtain capital for the purchase of seed corn by needy farmers, who, while not at the time paupers were in great danger of becoming such did they not receive aid.[10]

But it will be noticed that none of the cases upon this subject has recognized the constitutionality of acts which make grants of public monies derived from taxation to persons not either performing a public service similar to that performed by a public officer or a common carrier, or not assimilated to the position of paupers. In State *v.* Osawkee Township, in which the opinion was given by Judge Brewer, afterward a member of the United States Supreme Court, the constitutionality of the act was denied because the recipients of the aid were not actually paupers.

The only case which shows any tendency to regard as a public purpose the use of the power of taxation, with the idea

[9] See *e. g.* Burlington *v.* Beasley, 94 U. S. 310; Blair *v.* Cummings Co., 111 U. S. 363. These cases are interesting as showing how closely the Supreme Court follows the decisions of State courts as to what are public purposes and therefore proper purposes for taxation in their respective states, thus recognizing large powers of social coöperation in local communities.

[10] North Dakota *v.* Nelson Co., 1 N. D. 88.

of preventing pauperism, is the North Dakota case where it is said: "If the destitute farmers of the frontier of North Dakota were now actually in the alms houses of the various counties in which they reside, all the adjudications of the courts, state or federal, upon this subject, could be marshalled as precedents in support of any taxation, however onerous, which might become necessary for their support. But is it not competent for the legislature to make small loans, secured by prospective crops, to those whose condition is so impoverished and desperate as to reasonably justify the fear that unless they receive help, they and their families will become a charge upon the counties in which they live?"

What now has been the attitude of the state courts towards the granting under present constitutional provisions pensions or allowances to persons regarded as paupers? In answering this question it would seem to be necessary to bear in mind the character of the control of the funds granted. If that is private, the tendency of the courts is, as has been pointed out, to regard the purpose as also private. Courts which recognize education as a proper purpose of taxation sometimes consider as improper the grant of public monies to educational institutions under private control. (Jenkins *v.* Andover, 103 Mass. 94). It is true that this question of grants of money to private schools is somewhat complicated by the fact that private educational institutions which desire public aid are usually at the same time sectarian institutions, and on that account for other constitutional reasons not proper recipients of public aid. There are also cases which have taken the same view with regard to charitable institutions under private control which have been established with the idea of offering aid to particular classes of indigent persons.[11] Opposed to them, however, is an imposing array of cases which refuse to apply in charitable matters the rule that the private character of the control necessarily makes the character of the purpose private.[12]

[11] Such are the Keely Cure cases decided in Wisconsin, *e. g.* Wisconsin Keely Inst. Co. *v.* Milwaukee Co., 95 Wis. 153.

[12] Mayor *v.* Keely Inst. 81 Md. 106; In re House, 46 Pac. (Col) 117; White *v.* Inebriates' Home, 141 N. Y. 123; Shepherd's Fold *v.* New York, 96 N. Y. 137.

But even if we assume that the better rule is that public monies may constitutionally be granted to private corporations established for charitable purposes, we have by no means proved that public moneys may be granted to indigent individuals. For corporations under such conditions are regarded as acting as agents of the state in discharging the public function of supporting the poor. They do not receive the funds granted them for their own benefit.

In order to uphold from a constitutional point of view the grant of pensions to individuals we may attempt to show that such pensions are justified by the historical argument, as being a form of poor relief and are not declared improper by the logic of the decisions rendered with regard to the propriety of particular attempts to provide poor relief.

May old age, accident and sickness pensions granted to indigent persons properly be regarded as a form of outdoor relief? The cases on the subject of relief to paupers are legion but the question as to the constitutionality of the numerous statutes providing for the grant of outdoor relief and regulating the respective relations of the persons receiving it, ordering it and dispensing it has apparently not been raised. Such statutes are assumed to be constitutional and the decisions have concerned themselves with determining the reciprocal rights and duties of individuals under the statutes.

On general principles we can therefore assume that such pensions if granted to indigent persons under the limitations set forth would be constitutional as a form of outdoor relief unless the courts are of the opinion that the historical argument is inapplicable and that such pensions are evidence of an attempt to adopt for our free, independent and self-supporting American population a new and unprecedented form of relief originating outside of England or the United States and *e. g.* in one of the so called paternalistic governments of Europe.

It must be admitted that certain remarks made in the course of deciding one or two concrete cases tend to force the conclusion that all the state courts at any rate are not as yet prepared to regard pensions even to indigent individuals as

constitutionally proper in this land of individual freedom and private initiative. These cases are Lucas Co. *v.* State (75 Ohio State 114) and State *v.* Switzler (143 Mo. 287). In the former the legislature provided for granting to all adult blind persons "who have been residents of the state for five years and of the county one year, and have no property or means with which to support themselves" allowances not to exceed twenty-five dollars quarterly. The court declared the act to be unconstitutional largely on the ground that it provided for the expenditure of public funds for a private purpose and closed its argument by saying: "If the power of the legislature to confer an annuity upon any class of needy citizens is admitted upon the ground that its tendency will be to prevent them from becoming a public charge, then innumerable classes may clamor for similar bounties, and if not upon equally meritorious ground, still on ground that is valid in point of law, and it is doubted that any line could be drawn short of an equal distribution of property." The court was influenced in a negative way by the historical argument already mentioned. After quoting the formulation of it by Mr. Justice Miller in Loan Association *v.* Topeka, it remarked: "If that rule is applied here, it must be said that the act under consideration is without precedent in this state."

In the Missouri case the legislature passed an act providing for the levy of a progressive inheritance act, which was regarded by the courts as unconstitutional both because of its progressive character and because of the purpose for which it was levied, viz.—to provide fellowships in the State University for students dependent upon their own exertions for their education and "financially unable to otherwise obtain the same." In the course of the opinion the court took occasion to say that: "Paternalism whether state or federal, as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable

of managing their own affairs, and is pernicious in its tendencies. In a word it minimizes the citizen and maximizes the government. Our federal and state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government; a system in which the people are the sovereigns and the government their creature to carry out their commands. Such a government is founded on the willingness and right of the people to take care of their own affairs and an indisposition to look to the government for everything. The citizen is the unit. It is his province to support the government and not the government's to support him. Under self government we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant which should receive no nourishment upon the soil of Missouri."

It is to be noticed that the historical argument which is in large degree the controlling argument in these cases, when taken together with the insistence upon that political and economic theory known as *laisser faire*, to which is accorded an absolute and universal application at all times and under all circumstances, both make social reform impossible, so far as its concrete measures cannot be justified by our own history, and regards political and economic conditions as static rather than as progressive in character. The result of its universal application will be to fix upon the country for all time institutions, which were established in the eighteenth century to deal with conditions then existing, but which may in this the twentieth century be unsuitable because of the economic, social and political changes which have taken place in the last hundred years.

The emphasis given to this historical argument, furthermore, is not justified by the attitude of the Supreme Court of the United States. For Mr. Justice Miller after formulating the argument in his opinion in Loan Association *v.* Topeka,

was careful to indicate his feeling that it was not controlling by saying: "though this may not be the only criterion of rightful taxation," while the court in its more recent decisions on what is due process of law under the 14th amendment has shown very clearly that in its opinion the decision of the question is to be influenced by the geographical and social conditions attendant upon the particular case in which the question is raised.

Such an application of the historical argument, will, where the constitution is not easily susceptible of amendment, almost preclude the possibility of orderly and legal change in our conception of the powers of government, made necessary by changes in economic and social conditions, and may conceivably make unavoidable resort to revolutionary methods of change. Such a result naturally is not only to be deprecated but must be regarded by abhorrence by all who believe in a progressive development in an orderly manner.

It may then be said that until the state constitutions have been changed and the state courts have decided that such changes are from the viewpoint of the federal constitution proper, there is no great likelihood that a system of state pensions in the case of old age, sickness or accident which is based even on the indigence of the recipients of such pensions would be regarded as constitutional. Whether, where provisions have been inserted into the state constitutions making such pensions clearly constitutional, and the approval by the state courts of their propriety from the viewpoint of the federal constitution has been secured, the United States Supreme Court will be guided by the decisions of the state courts, is a question about which we may indulge in an almost indefinite amount of speculation, but as to which a certain answer cannot be given. It is well, however, to remember that the Supreme Court has several times held that the due process of law and the equal protection of the laws required by the 14th amendment are not the same thing in all parts of the country. That body has already recognized that certain climatic and population conditions have the effect of making state laws consti-

tutional which under different conditions might be regarded as improper. It does not seem a long step from this position to the further position that industrial, *i. e.* economic, rather than climatic and social conditions shall have the same effect, and it is always to be borne in mind that the Supreme Court has said more than once that the decision of state legislatures and state courts, which have knowledge of local conditions is entitled to the greatest respect and will not be overruled except in a perfectly clear case.[13]

The states, however, are not the only authorities in our government, which may conceivably wish to establish systems of pensions of the class under consideration. For in Great Britain and in the German Empire, which is a federal government like our own, it is the imperial and not the local government which has made provision for these pensions or something very like them. Can Congress then constitutionally provide for such pensions?

The constitution of the United States contains no express limitations upon the purposes for which federal taxes may be levied except those contained in Article 1, Sec. 8, which says, "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." Inasmuch as the government of the United States is regarded as one of enumerated powers it is considered that the latter part of this clause does not contain a grant of new power but rather imposes a limitation upon the purposes for which the taxing power may be used. So we may assume that the purposes of federal taxation are limited to paying the debts and providing for the common defence and general welfare.

We have practically no judicial decisions upon the question of the propriety of the purposes of federal taxation and naturally also none as to old age, sickness and accident pensions. There are, it is true, a great number of cases construing the

[13] The recent case upholding the constitutionality of a law providing for a bank depositors' guaranty fund takes a long step in the direction of upholding a scheme of compulsory insurance. Noble State Bank *v.* Haskell, 31 S. C. R. 186.

laws under which pensions have been granted to persons who at one time were soldiers or sailors of the United States. But in these cases the question of the constitutionality of this disposition of the public funds has not been discussed. On the contrary the constitutionality has been assumed and the cases have been concerned with the nature of the right to the pension, which has been held to be a gratuity,[14] or with the criminal provisions of pension laws adopted with the idea of preventing the grant of pensions to improper persons.[15] It is true that since military pensions have been held to be gratuities the power of Congress to provide for gratuitous allowances to private individuals out of public funds has been thus indirectly upheld but it is to be remembered that these military pensions have been given to a class of persons who by reason of the services they have rendered have been regarded as having special claims to the bounty of the government.

The only cases which we have where the courts have been asked to exercise a control over the discretion of Congress in the expenditure of public funds derived through the exercise of the power of taxation are the Sugar Bounty case,[16] and the Panama Canal case.[17]

In both these cases the Supreme Court refused to take jurisdiction and in the Panama Canal case the court said in reference to the demand of the plaintiff that the Secretary of the Treasury be enjoined from paying out money for the canal: "The magnitude of the plaintiff's demand is somewhat startling. . . . For the courts to interfere and at the instance of a citizen who does not disclose the amount of his interest to stay the work of construction by stopping the payment of money from the Treasury of the United States therefor would be an exercise of judicial power which, to say the least, is novel and extraordinary."

An even stronger position is taken by the Supreme Court in

[14] Walton *v.* Cotton, 19 Howard 355; United States *v.* Teller, 107 U. S. 64.
[15] See *e. g.* Frisbie *v.* United States, 157 U. S. 160.
[16] United States *v.* Realty Co., 163 U. S. 427.
[17] Wilson *v.* Shaw, 204 U. S. 24.

the Sugar Bounty case. In this case Congress passed an act making an appropriation for the payment of the claims of those persons who relying upon an Act of Congress providing for the payment of bounties had engaged in the manufacture of sugar. The bounty act was subsequently repealed but this appropriation had been made in order to tide over the sugar manufacturers who were regarded as having a moral claim against the government. The proper disbursing officer of the government acting upon the theory that both the original bounty act and the subsequent appropriation act were unconstitutional as appropriating public funds for a private purpose, refused to pay the bounty and a mandamus was asked to force him to make the payment. The lower court held the act to be unconstitutional and denied the motion. After this decision had been reached the plaintiffs in the suit sued the United States government in one of the circuit courts of the United States acting as court of claims which gave judgment for the plaintiffs and the case was brought by writ of error to the United States Supreme Court. That court believing that the case could be decided without entering upon a discussion of the validity of the original sugar bounty acts, affirmed the judgment of the lower court. It did so on the theory that the "debts of the United States" to pay which Congress may by the constitution levy and collect taxes include moral as well as legal obligations, saying: "Payments to individuals not of right or of a merely legal claim but payments in the nature of a gratuity, yet having some feature of moral obligation to support them have been made by the government by virtue of acts of Congress appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of mere charity." It is, of course, a far cry from claims of this sort to old age, accident and sickness pensions and it is doubtful if the moral obligation upon which such payments have been based could be so extended as to include a moral obligation of the government to its needy classes. Yet that obligation has from time immemorial been recognized in the laws of England and this country with regard to poor

relief. Furthermore, if it is said that the granting of old age, sickness and accident pensions is an unwarrantable extension of the activity of the federal government it may be answered that such action is no more of an extension of that activity than the grant of bounties for the encouragement of manufacturing which is subject to state rather than to federal regulation, or than the grant of money to educational institutions, which is provided by the Morrell act, or the gratuitous distribution of seeds to farmers.

Finally, it is to be remembered as the court says in closing its opinion in this sugar bounty case: "In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject for review by the judicial branch of the government."

It must therefore be said that there is at least some ground to be found in the decided cases and our legislative precedents for holding that pensions in case of old age, sickness or accident which are payable to indigent persons only may be provided for by the Congress of the United States. Even if this is not the case it would be difficult to find a judicial remedy by applying which the courts could interfere. The two cases from whose opinions quotations have been made would seem to indicate that the courts of the United States will not interfere to prevent the expenditure of public funds. And if the pensions were to be paid out of the proceeds of taxes which were levied for other purposes as well as for the payment of these pensions the taxpayer could not bring the matter up through contesting on this ground the constitutionality of a tax which from other points of view was constitutional.

If a precedent is desired for the distribution by the national government of public property to the needy classes in order

to subserve some social end conceived of as desirable, one need only point to the policy which has for so many years been followed by the government in its laws with regard to the public lands. Originally the public domain was regarded as an asset to be used to pay the public debt and a portion of the current expense of the government. Later on, viz., in 1830, it was used to encourage settlement through the plan of preëmption in accordance with which bona fide settlers were permitted to take up land to a maximum amount, viz., a quarter section at the minimum price of $1.25 an acre. Still later, viz., in 1862, the Homestead law was passed. Under this land might be acquired for nothing by a five years' occupation which might be commuted at stated periods by the payment of a regular purchase price. Finally from the beginning of our history land was granted outright either to specified classes of persons such as soldiers, or railway companies, or for specified purposes, as in the case of the swamp land grants. The purpose of the government was two-fold. It was first to develop the resources of the country; it was second to secure a class of small proprietors in the belief that such a class made a good economic basis for democratic government. Public property was granted to private persons not merely to develop the country but to offer greater equality of economic opportunity to the less well endowed classes of the community, and no attempt was made to declare unconstitutional the action of the government. It is, of course, true that Congress gets its power to legislate with regard to the public lands from a special clause in the constitution but its discretion as to the purposes for which this power may be exercised is no greater than it is as to the purposes for which the power of taxation may be used.

Who in view of the history of the public domain will venture to say that the constitution limits the power of Congress to dispose of the public funds as it sees fit in order to promote what it considers to be the "public welfare of the United States" to provide for which the constitution specifically says the taxing power may be used?

Our conclusions then as to the constitutionality of old age, accident and sickness pensions are, assuming that the courts do not change their view:

1. Such pensions when provided by state action are not prohibited by the 14th amendment or any other provision of the federal constitution, particularly if they are confined to indigent persons.

2. If not confined to indigent persons they are unconstitutional under the ordinary provisions of the state constitutions.

3. Even if confined to indigent persons they are probably unconstitutional under the ordinary provisions of the state constitutions, although there is some reason for believing they might be justified as a form of outdoor poor relief.

4. There is much ground for the belief that such pensions, particularly if confined to indigent persons, might constitutionally be provided by the federal government.